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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. No. 84.

City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, deceased, Appellant,

v.

William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, and Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA, SEPT. TERM, 1932, No. 7395, UNREPORTED OPINION MARCH 24, 1933 (R. 41).

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

The facts in this case are not in dispute. The hearing before the three-judge Court below was on the averments of the Bill (R. 2-11), all of which were admitted by the Answer, supplemented by certain additional facts set out in the Answer (R. 34-40) and in a Stipulation (R. 40-41). The essential facts are as follows:

In March, 1928, Thomas B. Clarke, a citizen and resident of New York City, then in his 80th year, at the request of his intimate friend Dr. Fiske Kimball, Director of the Pennsylvania Museum, loaned to the Museum, for exhibition at the formal opening of the newly constructed Museum building on the Phila-

delphia Parkway, his unique collection of early American portraits.

The arrangement between Clarke and Kimball was wholly oral. No consideration was paid or intended to be paid to Clarke for the loan. The term contemplated was about six months, but it was understood that the pictures would be returned to Clarke at any time on his request.

On several occasions subsequent to the date of the original loan in March, 1928, Clarke suggested the return of the paintings, but under pressure from Kimball to extend his loan because of the great appreciation shown by the public, Clarke orally consented from time to time to leave the paintings temporarily at the Museum and thus when Clarke died on January 18, 1931, they were there on display, returnable on demand.

The 164 paintings comprising the loan had been collected by Clarke over a period of twenty or thirty years. 85 of them were owned by a New York corporation, The Art House, Inc., of which Clarke was the sole stockholder. Of the remaining 79 owned by Clarke personally, 5 were at the time of the loan in his New York residence, 10 were on exhibition at the Century Club in New York, and the balance, 64, were in storage in New York City. All of the 79 owned by Clarke personally, which at the time of the loan had an unquestioned situs in New York City, had from time to time been exhibited there, in each case with selected groups of the 85 belonging to The Art House, Inc., but not as a unit or in connection with the entire 85.

In the spring of 1929, after the pictures had been at the Museum for about a year, Clarke, at Kimball's solicitation, wrote Kimball that if Kimball could secure a donor who would present the entire collection of 164 paintings to the Museum, Clarke would sell them as a whole to such donor at a stated price, it being then understood that Clarke would allow them to remain at the Museum for such reasonable time as Kimball might require to secure such donor. Subsequently, on May 21, 1930, Clarke again wrote Kimball stating that the above arrangement would terminate on June 17, 1930. From the latter date, at Kimball's solicitation, the pictures were permitted by Clarke to remain at the Museum until his death on January 18, 1931, but with the understanding that they would be returned to

Clarke in New York at any time on his request. During this time, Mr. Clarke, although not obligated to sell or otherwise to dispose of them, was willing (as the Answer avers) to sell to any purchaser who would buy the collection as a whole for presentation to the Pennsylvania Museum or to a substantially similar institution. While the paintings thus remained at the Museum, Clarke made no definite plans or request for their return or removal to any other place, except that on April 29, 1929, four of them were sent at his request to the Virginia Historical Society, for an exhibition at Richmond, which four were returned to the Philadelphia Museum on May 25, 1929.

The Museum is a non-profit corporation partially supported by the City of Philadelphia and the Commonwealth of Pennsylvania and has secured a substantial portion of the works of art therein displayed to the public by voluntary loans from non-resident philanthropists. It is customary for public museums to secure exhibitions in this manner, and the period for which the Clarke collection was held by the Museum prior to his death was shorter than the usual period of such loans.

Following Mr. Clarke's death, plaintiff, as executor of his estate, disclosed the facts to the defendants, directly or through their subordinates, and applied for a waiver of inheritance taxes on the ground that the pictures were only temporarily in Pennsylvania at the time of death and therefore were not subject to inheritance taxation by the Commonwealth.

Plaintiff was notified that an official appraisement of the Pennsylvania assets belonging to the estate of Thomas B. Clarke would be held in the Office of the Secretary of Revenue on April 20, 1931. Plaintiff appeared at said hearing through its attorneys and protested the appraisement of the property for taxation on the ground that the taxable situs thereof was in the State of New York and filed under protest an "Application for Appraisement and Waiver of Transfer Inheritance Tax Provisions" on the face of which it asserted that the deceased left no property in Pennsylvania subject to taxation. At the hearing the Commonwealth's appraiser, who was an employee in the Department of Revenue, referred the question of tax liability to the defendant, William A. Schnader. Pending the latter's decision he postponed the hearing from time to time to a

future undetermined day to be held after notice to the parties. To date the hearing has not been held.

Meantime, plaintiff as Executor of the Estate of Thomas B. Clarke, deceased, had taken up the question of tax liability with the proper officials of New York State and was advised in a letter dated July 11, 1932, from the New York State Tax Commission that the said collection of 79 paintings was subject to the New York estate tax and that an extension of time to pay said tax pending the determination of the legal question involved in Pennsylvania would not be allowed. Pursuant to the demand made in said letter and in order to avoid the severe penalties imposed by the New York statute for non-payment within a year and a half of decedent's death, plaintiff paid, under protest, to the State of New York on July 15, 1932, an estate tax amounting to $69,500. on the basis of a return which included therein the aforesaid collection of 79 paintings at the said value thereof in the amount of $714,500. The New York law provides a procedure for refund of inheritance taxes improperly paid, but this procedure does not provide for a refund of interest on the tax.

The above facts were alleged in the bill and answer in the case at bar.

The answer further alleged that "under the facts set forth in the Bill of Complaint and in this Answer, these 79 portraits had an actual situs in Pennsylvania" and were subject to inheritance tax in Pennsylvania and not in New York, obviously a conclusion of law. The only denial contained in the answer is in paragraph 26, as follows:

> "26. Defendants deny that the plaintiff has no adequate remedy at law. On the contrary, defendants aver that the plaintiff has a full, adequate and complete remedy at law duly provided by the statutes of the Commonwealth of Pennsylvania permitting the plaintiff to appeal to the Court of Common Pleas of Dauphin County from any assessment made against it by the defendants."

The answer also averred that the suit, being against defendants in their capacities as Attorney General and Secretary of Revenue of Pennsylvania, was against the Commonwealth

of Pennsylvania, contrary to the Eleventh Amendment, whereby the Court was without jurisdiction to entertain plaintiff's suit.

Plaintiff, a citizen and resident of New York, as Executor of a New York decedent, thus invokes the aid of a Federal Court of Equity to prevent defendants, both citizens of Pennsylvania, from enforcing a Pennsylvania statute to tax property of plaintiff not within the jurisdiction of Pennsylvania. Federal jurisdiction is based primarily on diverse citizenship, although the violation of a right guaranteed by the Federal Constitution is also presented.

Federal equity jurisdiction is invoked, *first,* because essential to protect property rights against injury, otherwise irremediable, resulting from the threatened enforcement of a State law contravening the Federal Constitution, the available remedies being confined to the State Courts; *second,* to remove the cloud on plaintiff's title to the paintings, created by the lien which the Pennsylvania inheritance tax law purports to impose on them, which obviously precludes plaintiff from selling the paintings as required by the will and entails serious and unwarranted expense in the administration of the estate; *third,* because under the available procedure in the Pennsylvania Courts, plaintiff is powerless to force the determination of the issue, but must await action by defendants, which has already been delayed for almost three years; *fourth,* because, even when pursued by defendants, the available Pennsylvania procedure provides an inadequate remedy, in that it will subject plaintiff to serious expense for a bond without possibility of reimbursement, and by reason of the probable delay will subject plaintiff to serious risk of losing the eighty per cent. credit on the Federal inheritance tax.

The present procedure is obviously both the orderly and fair way of determining, once and for all, whether under the admitted facts these paintings are subject to inheritance tax by New York or by Pennsylvania. The New York authorities have intervened and filed a brief. Both they and defendants expressed to the lower Court their desire to have the question thus determined. In spite of this, however, the Court below dismissed the bill on the ground that the right of plaintiff to appeal to the Dauphin County Court from the

assessment of the tax, or the right to defend a suit therefor by the Commonwealth of Pennsylvania, constituted an adequate remedy at law, which precluded the jurisdiction of the Federal Court. In so holding, the Court apparently overlooked the fact that neither of the remedies suggested is available in the Federal Court, and apparently confused the question as to what constitutes an adequate remedy under the Due Process Clause, (under which a remedy confined to the State Courts is adequate), with the question as to what constitutes an adequate remedy at law sufficient to preclude Federal Equity jurisdiction (in which case the remedy must be available in the Federal Courts).

The Court also disregarded the presence of the cloud on plaintiff's title, the irreparable loss to plaintiff incident to the expense of the bond, and the delay in the administration of the estate and the possible loss of the eighty per cent. credit on the Federal tax.

SPECIFICATION OF ERRORS.

I. The United States District Court for the Eastern District of Pennsylvania erred in denying the interlocutory injunction prayed for by the plaintiff.

II. The United States District Court for the Eastern District of Pennsylvania erred in dismissing the Bill of Complaint for want of equitable jurisdiction.

III. The United States District Court for the Eastern District of Pennsylvania erred in imposing the costs of the above entitled proceeding in equity upon the plaintiff.

IV. The United States District Court for the Eastern District of Pennsylvania erred in entering the following decree:

> "AND NOW, to-wit, April 11th, 1933, this cause came on to be heard at this term, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed as follows:
>
> "I. The Bill of Complaint be, and is hereby dismissed for want of equitable jurisdiction and at the cost of the plaintiff."

SUMMARY OF ARGUMENT.

I. THE COURT BELOW ERRED IN DISMISSING THE SUIT FOR WANT OF FEDERAL EQUITY JURISDICTION.

1. Federal Equity Jurisdiction will be exercised to enjoin the threatened enforcement of a State law which contravenes the Federal Constitution, when essential, as here, effectually to protect rights against injury otherwise irremediable.

Unless enjoined, the State authorities will impose on the New York property of appellant a Pennsylvania inheritance tax, subjecting appellant to an injury for which no other remedy in the Federal Courts is available.

The existing legal remedies, relied on by the Court below, are available only in the State Courts.

A State cannot thus tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits in its own Courts.

Whenever a citizen of a State can go into the Courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal Courts to maintain a like defense.

2. Equity jurisdiction is also necessary to remove the cloud on appellant's title to the paintings, resulting from the threatened tax lien thereon under the Pennsylvania inheritance tax.

The jurisdiction of the Federal Equity Courts to remove liens, incumbrances and clouds on the title to personal property is expressly recognized by Section 8 of the Act of March 3, 1875, incorporated in Section 57 of the Judicial Code, and by the decisions of this Court.

3. The available remedies at law in the State Courts are inadequate in that they are wholly in the control of the adverse party, subjecting the taxpayer to expensive and irreparable delay, to the unredressable expense of a bond in double the amount of the tax, and to the grave risk of losing the eighty per cent credit on the Federal inheritance tax.

II. THE COURT BELOW ERRED IN NOT SUSTAINING THE PRAYERS OF THE BILL.

It is hoped that the Court will exercise its discretion to make final disposition of the case on the merits at this time, thus assuring appellant the expedited adjudication which Congress, by Section 266 of the Judicial Code, contemplated for this important class of cases.

The transmission from the dead to the living of a particular thing is an event which can take place in and be made the basis of inheritance taxation by but one State.

The paintings collected, kept and used by Clarke at his New York domicile for many years, could lose their New York situs only by their removal from New York with the intention of placing and keeping them permanently in a new situs.

The temporary loan of the paintings to the Pennsylvania Museum did not thereby give them a permanent Pennsylvania situs, sufficient to sustain the imposition of a Pennsylvania inheritance tax by reason of the New York owner's death prior to their return to New York; and the executor properly paid the inheritance tax thereon to New York.

While the presence of the pictures in Pennsylvania might conceivably have subjected them to a reasonable local property tax, on an annual basis, consistent with the expense of their temporary protection under Pennsylvania law, there existed no "real taxable relationship" on the part of Pennsylvania to the event of the passage of title thereto from a New York decedent sufficient to justify an inheritance tax on Clarke's death before the return of the paintings to their New York domicile.

ARGUMENT.

I. The Court Below Erred in Dismissing the Suit for Want of Federal Equity Jurisdiction.

1. FEDERAL EQUITY JURISDICTION WILL BE EXERCISED TO ENJOIN THE THREATENED ENFORCEMENT OF A STATE LAW WHICH CONTRAVENES THE FEDERAL CONSTITUTION, WHEN ESSENTIAL, AS HERE, EFFECTUALLY TO PROTECT PROPERTY RIGHTS AGAINST INJURY OTHERWISE IRREMEDIABLE.

In the case at bar, admittedly the State officials have threatened to impose the Pennsylvania inheritance tax of approximately $50,000 on these 79 paintings, admittedly valued at $714,500.

> "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person, who as an officer of the State is clothed with the duty of enforcing its laws and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a federal court of equity. *Cavanaugh* v. *Looney*, 248 U. S. 453, 456; *Truax* v. *Raich*, 239 U. S. 33, 37, 38. See also *Ex parte Young*, 209 U. S. 123, 155, 162; *Adams* v. *Tanner*, 244 U. S. 590, 592; *Greene* v. *Louisville & Interurban R. R. Co.*, id. 499, 506; *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278, 293; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 621; *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 241; *Davis & Farnum Manufacturing Co.* v. *Los Angeles*, 189 U. S. 207, 217."
>
> *Terrace* v. *Thompson*, *263 U. S. 197, 214.*

Appellant, the New York Executor of a New York decedent, has a constitutional right to have determined by the Federal Court its controversy with the Pennsylvania State officials as to whether Pennsylvania may constitutionally impose such tax.

As stated by the Court below in its opinion (R. 43):

> "The laws of Pennsylvania do not extend to the taxpayer the remedy of paying the tax under protest and bringing suit in the courts for its recovery."

The only clear way to test the validity of the tax under the state statutes (and this was regarded as an adequate remedy at law by the lower Court), is to take an appeal from the administrative appraisers to the Dauphin County Court upon posting a bond to cover the full amount of the tax. From the decision of the Dauphin County Court an appeal is allowed to the Supreme or Superior Court of Pennsylvania, depending upon the amount involved (Act of April 9, 1929, P. L. 343, 72 P. S., Sec. 1202). This legal remedy is obviously not available to plaintiff in the Federal Court by virtue of his diverse citizenship, as would be the right to pay the tax under protest and sue for its recovery.

The other remedy at law relied on by the lower Court (though not set up in the answer of the Attorney General of Pennsylvania) is the defense of a suit which might be brought by the Commonwealth of Pennsylvania in its own courts for the amount of the tax. Aside from the fact that the institution of such a suit would be wholly within the control of the State, and of the doubt as to whether the taxpayer would have the right to attack the legality of the assessment thus collaterally, certainly the taxpayer would be powerless to remove the case to the Federal Court, the State of Pennsylvania not being a citizen within the Removal Acts.

This Court has repeatedly held, however, that in a controversy between citizens of different states, involving an amount sufficient to sustain Federal jurisdiction, the foreign litigant cannot be deprived of his day in the Federal Court because of remedies at law provided by the State Law that are confined to the State Courts. In such cases the jurisdiction of the Federal Equity Court has been sustained in protection of the inherent and fundamental right of the citizen of the other State to have the controversy passed on by the Federal Court.

Reagan v. *Farmers Loan & Trust Co., 154 U. S. 362, 391;*

Smyth v. *Ames, 169 U. S. 466, 515-517;*

Terral v. *Burke Constr. Co., 257 U. S. 529, 532;*
Chicago B. & Q. R. R. Co. v. *Osborne, 265 U. S. 14, 16;*
Risty v. *Chicago R. I. & Pac. Ry. Co., 270 U. S. 378, 388.*

In the Reagan case, where a Federal Court in equity was held to have jurisdiction to restrain the enforcement of an order of the Texas Railroad Commission at the instance of a citizen of another state, notwithstanding the objection that plaintiff had an adequate remedy at law in the Courts of Texas, this Court laid down the general rule in the following language:

> "Nor can it be said in such a case that relief is obtainable only in the courts of the State. For it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defence. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the Federal Courts. *Cowles* v. *Mercer County, 7 Wall. 118; Lincoln County* v. *Luning, 133 U. S. 529; Chicot County* v. *Sherwood, 148 U. S. 529.*"

In *Terral* v. *Burke Construction Co., 257 U. S. 529; 532,* this Court, in sustaining the jurisdiction of the Federal Court of Equity to enjoin actions by State officials in depriving plaintiff of a right to sue in the Federal Courts, thus stated the grounds on which the above rule is based:

> "The principle established by the more recent decisions of this court is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the federal

courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the Federal Constitution confers upon citizens of one State the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law. * * * The appellant in proposing to comply with the statute in question and revoke the license was about to violate the constitutional right of the appellee. In enjoining him the District Court was right, and its decree is

Affirmed."

In *Chicago B. & Q. R. R. Co.* v. *Osborne, 265 U. S. 14, 16,* this Court further stated the distinction as follows:

"If an action to recover the payment were allowed, the suit might be brought in the Courts of the United States, under the usual conditions, as well as in those of the State. *Singer Sewing Machine Co.* v. *Benedict, 229 U. S. 481, 486.* But the writ of error of course can be sued out only in the State, and a remedy in the State Courts only has been held not to be enough. *Smyth* v. *Ames, 169 U. S. 466, 516. St. Louis-San Francisco Ry. Co.* v. *McElvain, 253 Fed. 123, 136. Franklin* v. *Nevada-California Power Co., 264 Fed. 643, 645.*"

Risty v. *Chicago, R. I. & Pac. Ry. Co., 270 U. S. 378, 388,* involved suits by citizens of states other than South Dakota to enjoin the County Commissioners, the Auditor and the Treasurer of Minnehaha County of South Dakota, from making any apportionment of benefits or assessments of costs affecting the property of the several plaintiffs for the construction or repair of a certain drainage system. In all of the suits, except one, there was diversity of citizenship. In

each it was alleged that the proceedings purporting to be had under the state statute were unauthorized and void and denied to plaintiffs due process of law and the equal protection of the laws, in contravention of the Constitution of the United States. It was argued by defendants that an adequate remedy was allowed under the State statutes. This Court summed up the situation as to all the suits except the one not involving diversity of citizenship in the following language (p. 388):

> "The remedy by appeal to the state court under § 8469 does not appear to be coextensive with the relief which equity may give. In any event, it is not one which may be availed of at law in the federal courts, and the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts. *Smyth* v. *Ames, 169 U. S. 466; Chicago B. & Q. R. R. Co.* v. *Osborne, supra.*"

The Court below relies for its decision on *Matthews* v. *Rodgers, 284 U. S. 521,* and *Keokuk & Hamilton Bridge Co.* v. *Salm, 258 U. S. 122,* neither of which was a case involving diverse citizenship. In the first case, Federal jurisdiction was sought to be based on the allegation that the operation of the State law in question effected an interference with interstate commerce; in the second, that there was a denial of due process under the Fourteenth Amendment. The Court below thus apparently confused the question as to what constitutes an adequate remedy under the due process clause (where a remedy confined to the State Courts is obviously adequate) with the question as to what constitutes such an adequate remedy at law as to preclude Federal equity jurisdiction (where the remedy must be available in the Federal Courts).

The misapprehension by the lower Court of the basis of the decision in *Matthews* v. *Rodgers* is emphasized by the fact that in its quotation (R. 45-46) from the opinion of this Court (p. 526), the Court below omits the concluding phrase of the sentence, here inserted in italics (matter in brackets supplied by Court below):

> "If the remedy at law (given by the state law) is plain, adequate, and complete, the aggrieved party is left

> to that remedy in the state courts, from which the cause may be brought to this Court (the Supreme Court of the United States) for review if any federal question be involved, *Jud. Code § 237, or to his suit at law in the federal courts if the essential elements of federal jurisdiction are present.*"

The decisions cited by this Court in *Matthews* v. *Rodgers,* such as *Henrietta Mills* v. *Rutherford County, 281 U. S. 121, Singer Sewing Machine Co.* v. *Benedict, 229 U. S. 481,* and *Atchison, Topeka & Santa Fe Ry.* v. *O'Connor, 223 U. S. 280,* show upon examination that wherever diversity of citizenship existed, the right to sue at law for a refund was held to be an adequate remedy, in each case, because this remedy was available to the taxpayer on the law side of the Federal Court. Thus, in the *Henrietta Mills* case "there would have been an adequate remedy at law, not only in the state court, but also in the Federal court" (p. 127). In the *Singer Sewing Machine Company* case this Court, in speaking of the Colorado statute which gave to the taxpayer a right to recover back from a county, in a law suit, the illegal taxes collected, said: "This right was one which could be enforced by an action at law in the Circuit Court, no less than in the state courts, if the elements of Federal jurisdiction, such as diverse citizenship and the requisite amount in controversy, were present" (229 U. S. at p. 486).

The Court below further shows its oversight of the distinction in question by referring to *Nevada-California Power Co.* v. *Hamilton, 235 Fed. 317 (affirmed 264 Fed. 643)* in connection with the statement by the Court below that "of course, a non-resident sued by the state of Pennsylvania for tax cannot remove the cause to the District Court upon the ground of diversity of citizenship" (Rec. 45). But this is the very heart of the matter. It is the very reason why the Nevada Court assumed jurisdiction, saying:

> "If the Power Company be remitted to its defense in a tax suit, under sections 3657 to 3664 of the Revised Laws of Nevada, the actions must be brought in the name of the state, and in the counties where

the assessments are made. Section 3659. Such an action could not be removed to a federal court on the ground of diverse citizenship, because the state is not a citizen. Stone *v.* South Carolina, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; Title Guaranty, etc., Co. *v.* State of Idaho, 240 U. S. 136, 36 Sup. Ct. 345, 60 L. Ed. 566" (p. 337).

* * * * * * *

"Consequently, if the Nevada-California Power Company be denied a hearing because relief is afforded in a tax suit in a state court, it will be deprived of the right to have its cause tried in a federal tribunal, notwithstanding the fact that the essential elements of federal jurisdiction, such as diverse citizenship and requisite amount in controversy, as well as an alleged constitutional right violated, are present" (p. 338).

A very enlightening statement of the basis for the foregoing rule is that of Judge McPherson of the Third Circuit in the case of Borden's Condensed Milk Co. *v.* Baker, 177 Fed. 906, 910-11:

"As it seems to us, certain language in some of the cases has been misunderstood, and it may therefore be as well to state briefly what we understand to be meant by the adequate remedy at law that will prevent a federal court of equity from taking jurisdiction. Such a court has an equitable jurisdiction (unless changed by Congress) similar in extent to the jurisdiction that belonged to the English chancery in 1789. Among the cases in which the chancery exercised jurisdiction were certain controversies for which no adequate remedy existed in the English courts of law. The chancery did not inquire whether the complainant could obtain redress in a foreign court, but whether an English court of law could fully deal with the situation. So a federal court of equity, following the chancery precedents, does not inquire about the remedies available in a state court (which for this purpose is a foreign tribunal), but whether a federal court of law offers an adequate remedy; and this inquiry is confined to the remedies in the federal courts, no matter how ancient may be the remedies offered by the state."

2. EQUITY JURISDICTION MAY ALSO BE BASED ON THE REMOVAL OF THE CLOUD ON PLAINTIFF'S TITLE TO THE SEVENTY-NINE PAINTINGS, CAUSED BY THE ALLEGED LIEN OF THE PENNSYLVANIA TAX.

Apart from the fundamental necessity for Federal Equity jurisdiction to insure a New York citizen his day in the Federal Court to have determined a controversy with citizens of Pennsylvania involving the requisite amount, equity jurisdiction is amply sustained by the necessity for the intervention of the Equity Court to remove the cloud on plaintiff's title resulting from the claimed imposition of the Pennsylvania inheritance tax which the Pennsylvania law provides shall constitute a lien on the property until paid or satisfied.

It is well settled that equity has jurisdiction in this type of case to enjoin unlawful tax proceedings which cloud the plaintiff's title.

Greene v. *Louisville & Interurban R. R. Co., 244 U. S. 499;*

Risty v. *Chicago R. I. & Pac. Ry. Co., 270 U. S. 378.*

The lower Court distinguished these cases on the ground that they involved real estate and stated that no decision had been called to their attention "in which a possible lien upon a specific article or articles of personal property has been held to constitute a cloud upon title which will warrant injunctive relief" (Rec. 42). There are, however, many authorities upholding the jurisdiction of equity to remove a cloud upon personal property, to which counsel for plaintiff would gladly have called the Court's attention if the question of equity jurisdiction had been argued by the Attorney General or questioned at the argument in the Court below.

5 Pomeroy's Equity Jurisprudence (2 Ed.) Sec. 2151;

Jellenik v. *Huron Copper Mining Co., 177 U. S. 1;*

Thompson v. *Emmett Irr. Dist. (C. C. A. 9) 227 Fed. 560, 564;*

Fisher v. *Brucker (D. C. E. D. Mich.), 41 F. (2d) 774.*

In *Jellenik* v. *Huron Copper Mining Co., 177 U. S. 1,* this Court sustained the jurisdiction of the Federal Court of Equity to entertain a bill to remove a cloud on the title to shares of stock.

In *Thompson* v. *Emmett Irr. Dist., 227 Fed. 560,* the Court said (p. 564):

> "For the present purposes the allegations of the bill must be taken as true. They state a case for the removal of a cloud upon the title to personal property. It has been held that such a case is within the jurisdiction of a court of equity. 6 Pomeroy's Equity Jurisprudence, § 729; Sherman *v.* Fitch, 98 Mass. 59; Voss *v.* Murray, 50 Ohio St. 19, 32 N. E. 1112; Rosenbaum *v.* Foss, 4 S. D. 184, 56 N. W. 114; Stebbins *v.* Perry County, 167 Ill. 567, 47 N. E. 1048; Earle *v.* Maxwell, 86 S. C. 1, 67 S. E. 962, 138 Am. St. Rep. 1012; Magnuson *v.* Clithero, 101 Wis. 551, 77 N. W. 882; New York & New Haven Ry. Co. *v.* Schuyler, 17 N. Y. 592.
>
> *"This jurisdiction is recognized as existing in a federal court of equity by section 8 of the act of March 3, 1875 (18 Stats. 472), incorporated into section 57 of the Judicial Code.* Jellenik *v.* Huron Copper Min. Co., 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647; Louisville & Nashville Ry. Co. *v.* Western Union Tel. Co., 234 U. S. 369, 371, 34 Sup. Ct. 810, 58 L. Ed. 1356." (Italics ours.)

Section 57 of the Judicial Code, above referred to, recognizes in express words the jurisdiction of the Federal Courts of Equity to entertain bills to remove cloud on title to personal property: "When in any suit commenced in any District Court of the United States * * * to remove any incumbrance or lien or *cloud upon the title to* real *or personal* property," etc.

Fisher v. *Brucker, 41 F. (2d) 774,* was a three-judge court case so similar to the case at bar that it merits analysis. That suit, in which the jurisdiction of the court was "properly invoked on the grounds both of diversity of citizenship and the presence of a federal question" (p. 774), involved the construc-

tion and constitutionality of the Michigan inheritance tax statute. The two plaintiffs, legal residents of New York and of Ohio, were the executors under the will of James W. Packard, who died a citizen and resident of New York. The defendants were the attorney general and the auditor general of Michigan. The property involved consisted of 80,000 shares of the capital stock of Packard Motor Company, a Michigan corporation. An inheritance tax was paid on the said shares of stock to the State of New York. The defendants, however, asserted "the claim of a lien on this stock, to secure payment of the tax claimed by them to be payable, under the Michigan inheritance tax laws" and the plaintiffs averred in their bill that this "claim hinders and interferes with the beneficial use and disposal of such stock by the plaintiffs." Thereupon plaintiffs commenced suit, "seeking to restrain the defendants, temporarily and permanently, from attempting to enforce such claimed lien, from hindering the transfer of said stock, and from attempting to enforce against the plaintiffs, with respect to such stock or the transfer thereof, any of the penalties or other provisions of the Michigan inheritance tax laws, such relief being sought on the grounds that such laws, properly construed, do not impose such a tax, and that, if construed as imposing said tax, they abridge the privileges and immunities of the plaintiffs as citizens of the United States, deprive them of property without due process of law, and deny them the equal protection of the laws." The District Court of three judges found that plaintiffs' contentions were correct and issued the injunction.

3. THE REMEDY PROVIDED BY PENNSYLVANIA LAW IS FURTHER INADEQUATE IN THAT IT IS ENTIRELY IN THE CONTROL OF THE ADVERSE PARTY, SUBJECTING PLAINTIFF TO IRREPARABLE DELAY, EXPENSE AND RISK OF LOSS IN SETTLING THE ESTATE.

Under Pennsylvania law, the appellant cannot compel the State officials to make an assessment, nor to bring suit for the amount of the tax found due. In *Bank of Kentucky* v. *Stone (C. C. D. Ky., Harlan, Taft and Lurton, J. J. per Taft, J.), 88 Fed. 383, 391 (affirmed 174 U. S. 799),* the Court held that "a court of equity will not withhold relief from a suitor merely because he may have an adequate remedy at law if his adversary chooses to give it to him. The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party" (p. 391). Judge Taft pointed out that if the taxpayer awaited its right to defend in a suit to collect taxes, it would run the risk of a penalty of 10% and a fine of $50. a day for every day of its delinquency, from which burden of risk equity could give relief.

The Pennsylvania statute imposes penalty interest at 12% a year for non-payment after one year, and as set forth hereinafter, the appellant is suffering irreparable injury by reason of the tardy determination of this cause. The greater delays of litigation at law, as compared with equity, therefore, imposes on appellant a differential burden of risk which equity may and should relieve. In the case at bar, moreover, as has been pointed out, plaintiff is seeking to remove the cloud of the threatened lien on its property which is preventing the sale thereof pending this litigation and it is and will continue to suffer irreparable injury by reason of the slowness of the legal remedies provided by State law. (See also *Fredenberg* v. *Whitney, 240 Fed. 819, 822;* and compare *Pacific Tel. Co.* v. *Kuykendall, 265 U. S. 196, 205.)*

Time is of the essence of the remedy in this case and, unless equity intervenes, plaintiff, and those for whom they act, will suffer irreparable injury. Clarke died on January 18, 1931. Under his will the executor was directed to sell the pictures and hold the proceeds along with the rest of the residuary estate in trust, paying the income to certain beneficiaries (R. 13). The executor disclosed the facts to the proper Revenue officers of Pennsylvania on March 25, 1931.

A hearing was held on April 20, 1931, when a return was filed under protest. Notwithstanding "repeated requests of plaintiff for an immediate determination of tax liability" (R. 9), defendants had not taken official action (although immediately after payment to New York on July 15, 1932, defendant Schnader orally advised plaintiff that the decision would be adverse) up to the time the present Bill was filed on November 23, 1932, nearly two years after decedent's death and eighteen months after notice to the Revenue officials of the Commonwealth. The executor delayed payment in New York until the last minute, hoping for a decision in Pennsylvania, and then was compelled to elect a probable tax jurisdiction and pay New York to avoid burdensome penalties.

There is no statute of limitations in Pennsylvania against the assessment and collection of such taxes, and it is conceivable that the taxing officials and the Attorney General could have held this question in abeyance for the next twenty years. Under the Pennsylvania statute no appeal can be taken until the taxing officials decide to make a formal appraisement (assessment). Likewise, after assessment, the executor cannot compel the attorney general to bring a suit for collection, in which suit the lower Court says plaintiff can defend. If he chooses not to sue, the lien on the pictures will continue indefinitely. Furthermore, if the Attorney General elects to bring suit for the tax in the name of the Commonwealth, not only would the suit not be removable to the Federal Court, but it is doubtful whether the legality of the assessment could there be collaterally attacked, since the erroneous determination of situs and, therefore, the invalidity of the tax, might not appear on the face of the record. *State* ex rel *Johnson* v. *Merchants & Miners Bank*, 279 Mo. 228, 213 S. W. 815. The bare statement of this possibility, coupled with the history of the case, shows the inadequacy of the remedy in the state courts and the hardship which equity should relieve.

Paragraph 25 of Plaintiff's Bill (R. 10) distinctly averred that the threat of appraisement, assessment and collection by the defendants and the unlawful failure and refusal of the defendant, Metzger, to issue a waiver of taxes for over a year and a half "has caused and is causing immediate irreparable injury to plaintiff in that it is seriously interfering with the proper administration of the Thomas B. Clarke Estate

in the Surrogate's Court of New York and is preventing distribution of the estate to the legatees thereof who are entitled thereto, and is forcing the plaintiff as executor to maintain large cash reserves at a low rate of interest to cover possible taxes in Pennsylvania and the costs of litigation there, including the cost of bonds and of attorneys' fees; and in that the threatened tax constitutes a possible lien and, therefore, cloud on the title of plaintiff to the aforesaid 79 paintings and, consequently, interferes with the sale thereof as provided for in the will of testator."

It will be noticed that the executors in *Fisher* v. *Brucker* (supra, p. 18 hereof) made an almost identical contention, averring that the claim of defendants of a lien on the stock "hinders and interferes with the beneficial use and disposal of such stock by the plaintiffs" (p. 775) and the Court there determined that "the bill was properly filed for the usual injunctive relief, under the general equitable jurisdiction of a federal district court in equity" (p. 778). The lower Court in the case at bar, however, lightly dismissed the facts so alleged in plaintiff's bill as "ordinary incidents in the administration of any estate in which disputed questions have to be litigated" (R. 46). It is submitted, however, that past delays have and future delays will cause irreparable injury to the parties in interest. There is a present loss of income to the beneficiaries and of commissions thereon to the plaintiff executor by reason of the necessity of maintaining large liquid funds at a low rate of interest. The pictures cannot be sold because of the cloud of this tax lien and are producing no income, whereas the proceeds of a sale could be invested profitably. The market for the pictures is destroyed because the executor cannot give a clear title.

Moreover, there is grave danger that unless equity intervenes, the estate will lose the benefit of the 80% credit under the Federal Estate Tax Act. As a matter of fact, this has proved one of the most vexatious and perplexing results of the situation in Pennsylvania, because the federal officials will not allow a credit for either the New York or the Pennsylvania taxes until the matter is settled, and, if the tax should ultimately be held to be payable to Pennsylvania, this credit may be entirely lost because of the statute of limitation relative thereto. Section 301 (b) of the Revenue Act of 1926 as

amended by Section 802 of the Revenue Act of 1932 provides that the 80% credit allowed "shall include only such taxes as were actually paid and credit therefor claimed within four years after the filing of the (Federal Estate Tax) return." That return was filed by plaintiff on January 18, 1932. Nearly a year of the four-year period had elapsed at the time this Bill was filed. As stated, the defendants could have delayed decision for the balance of the term; but even if they had acted promptly, it is highly improbable that the necessary litigation in the Dauphin County Court, the Supreme Court of Pennsylvania and thence to this Court, could have been completed within the balance of the statutory period. *A fortiori*, this would be true if the plaintiff waited on tax suits brought by the Commonwealth and took its appeals therefrom.

The controlling law on this point is found in the rule that equity will assume jurisdiction if the remedy at law is not "reasonably prompt and efficacious."

Stewart Dry Goods Co. v. *Lewis, 53 S. Ct. 68, 69;*
Clark v. *Pigeon River, etc. Co. (C. C. A. 8), 52 F. (2d) 550, 557;*
Cf. Ex parte Young, 209 U. S. 123, 163.

The statutory right of appeal to the Dauphin County Court provided by the Pennsylvania Act of 1929 is further subject to the objection that in order to take such an appeal the taxpayer must post a bond in double the amount of the estimated tax and even though he thereafter succeeds in his appeal there is no restitution of the cost of the bond. In the present case there would be a tax of approximately $50,000. and a bond of approximately $100,000., costing at least $1,000. a year. If litigation lasted three years, a not unreasonable assumption, this bond would cost $3000., and the whole amount thereof would be lost even though the taxpayer were successful. It is submitted that this is not an ordinary incident of litigation. It is not like the case of a comparatively small bond put up for costs of suit. The situation is analogous to cases in which it was held that a suit for refund is an inadequate remedy at law where no interest can be recovered in the suit.

Hopkins v. *Southern Cal. Tel. Co., 275 U. S. 393;*
Nutt v. *Ellerbe, 56 F. (2d) 1058, 1063;*
Southern Ry. Co. v. *Query, 21 F. (2d) 333, 342.*

II. The Court Below Erred in Not Granting the Equitable Relief Prayed for in the Bill.

While of course the primary question presented on this appeal is merely the jurisdiction of the lower Court, sitting in equity, to grant the relief, nevertheless this Court unquestionably has power and authority now to make final disposition of the case, if in its discretion it sees fit to consider the merits and to enter a final decree.

Smith v. *Vulcan Iron Works, 165 U. S. 518, 525;*
Denver v. *Denver Union Water Co., 246 U. S. 178, 182;*
North Carolina R. R. v. *Story, 268 U. S. 288, 292.*

There being no dispute as to the facts, and the question involved being one which must in any event be brought back to this Court for decision, it is hoped that this Court will not permit the error of the lower Court to deprive this plaintiff of the expedited final adjudication which Congress, by Section 266 of the Judicial Code, has attempted to prescribe for this important class of cases. The question presented involves solely the construction and elaboration of this Court's recent decisions on the constitutional rights of different States to impose inheritance taxes on the same property, so that an opinion by the lower Court would not be as important as if the facts were complicated or disputed, or as if the question were one at common law. Furthermore, there are particular reasons why this Court might consider it proper to exercise its power in this case. As suggested above, prompt relief is necessary because delays are working irreparable injury to the estate. This suit has already been before the Federal courts for approximately a year and the dispute had been before the state authorities for a year and a half prior thereto. This has resulted in serious loss of income to the estate from inability to complete the administration. A comparatively short additional delay will lose to plaintiff the right to the 80% credit against the Federal Inheritance Tax in case the right of Pennsylvania to the tax claimed be sustained.

By four important recent decisions, this Court has "progressively applied" the principle limiting the constitutional right of more than one State to impose inheritance taxes on the transmission, by a given decedent, of a specific item of property, and defining the tests by which to determine which of several contending states may collect the tax under given circumstances:

Frick v. *Pennsylvania, 268 U. S. 473;*
Farmers Loan & Trust Co. v. *Minnesota, 280 U. S. 204;*
Safe Deposit & Trust Co. v. *Virginia, 280 U. S. 83;*
First Nat'l Bank of Boston v. *Maine, 284 U. S. 312.*

While none of these cases expressly covers the precise question here presented, the principles enunciated in them, in the light of the prior decisions by this Court, clearly support the position of plaintiff below and the present appellant,—that the seventy-nine paintings temporarily loaned by Clarke to the Pennsylvania Museum had, at his death, no legal situs in Pennsylvania sufficient to warrant the exaction by Pennsylvania of an inheritance tax on their transfer from a New York decedent to his New York legatees.

Frick v. *Pennsylvania, 268 U. S. 473*, presented a case converse to that at bar. There Frick, a resident of Pennsylvania, had a collection of rare paintings and works of art permanently housed in a building in New York City especially constructed for that purpose and known as "The Frick Collection." He also had certain paintings, objects of art, furniture, etc., at his summer home in Massachusetts. Pennsylvania claimed a right to impose an inheritance tax upon these items of tangible personal property, but this Court held that such a tax could not be imposed under the Fourteenth Amendment because the property had an "actual situs" in New York and in Massachusetts respectively, saying (p. 496):

> "* * * that the Pennsylvania statute, in so far as it attempts to tax the transfer of tangible personalty having an *actual situs* in other States, contravenes the due process of law clause of the Fourteenth Amendment and is invalid." (Italics ours.)

The decision clearly pointed out that an inheritance tax on such items could be imposed only by the State where they had an actual situs. The Court did not, however, there define what

it meant by "actual situs" because the situation was clear in that respect. The Frick property held taxable outside of Pennsylvania consisted of the Frick Collection of paintings, housed permanently in a special building in New York City and bequeathed by Frick to New York, and of furniture in his New York residence and in his summer home in Massachusetts, in each case a part of his permanent establishments in those localities. New York was the permanent address of the Frick Collection, as well as of his furnished New York residence. Massachusetts was the permanent address of his furnished summer home at Pride's Crossing. These were the respective States where, in the language of the later Maine case, the property was "*kept and used.*"

In *Safe Deposit & Trust Co.* v. *Virginia, 280 U. S. 83,* however, the Court referred to the Frick case and said (p. 93):

> "Tangible personal property *permanently* located beyond the owner's domicile may not be taxed at the latter place. *Union Refrig. Transit Co.* v. *Kentucky, supra; Frick* v. *Pennsylvania, supra.*" (Italics ours.)

Later on, in the opinion, the Court speaks of the "definite" taxable situs (p. 93):

> "Here we must decide whether intangibles—stocks, bonds—in the hands of the holder of the legal title *with definite taxable situs* at its residence, not subject to change by the equitable owner, may be taxed at the latter's domicile in another State." (Italics ours.)

And again the Court speaks of "a permanent situs for lawful taxation" (p. 92):

> "Here, where the possessor of the legal title holds the securities in Maryland, thus giving them a *permanent situs for lawful taxation* there, and no person in Virginia has present right to their enjoyment or power to remove them, the fiction must be disregarded." (Italics ours.)

In *Farmers Loan & Trust Company* v. *Minnesota, 280 U. S. 204,* this Court, overruling *Blackstone* v. *Miller, 188 U. S. 189,* and modifying a part of its decision in the Frick case, held that stocks and bonds were subject to inheritance tax only by the State of the domicile. Referring to the Frick case, the Court said (p. 210):

"At this time it cannot be assumed that tangible chattels *permanently* located within another State may be treated as part of the universal succession and taken into account when estimating the succession tax laid at the decedent's domicile. *Frick* v. *Pennsylvania* is to the contrary." (Italics ours.)

By the above-quoted statements the Court interpreted the phrase "actual situs" as used in the Frick case, holding that tangible chattels acquire an "actual situs" in a State other than that of the decedent's domicile only when they are "permanently located" in such new State and acquire a "permanent situs for lawful taxation there."

In *First National Bank of Boston* v. *Maine, 284 U. S. 312,* the Court held that Maine could not constitutionally impose an inheritance tax upon the estate of a Massachusetts decedent with reference to shares of stock in Maine corporations owned by the testator at the time of his death. In the opinion the Court thus reviewed its decisions on the subject of inheritance tax jurisdiction (p. 326):

"It long has been settled law that real property cannot be taxed, or made the basis of an inheritance tax, except by the state in which it is located. More recently it became settled that the same rule applies with respect to tangible personal property. And it now is established by the three cases last cited that certain specific kinds of intangibles, namely, bonds, notes and credits, are subject to the imposition of an inheritance tax only by the domiciliary state; and this notwithstanding the bonds are registered in another state, and the notes secured upon lands located in another state, resort to whose laws may be necessary to secure payment.

"The rule of *immunity from taxation by more than one state,* deducible from the decisions in respect of these various and distinct kinds of property, *is broader than the applications thus far made of it.* In its application to death taxes, the rule rests for its justification upon the *fundamental conception* that *the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which cannot take place*

in two or more States at one and the same time. In respect of tangible property, the opposite view must be rejected as connoting a physical impossibility; in the case of intangible property, it must be rejected as involving an inherent and logical self-contradiction. Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local *situs* of a thing for the purpose of transferring it in one state, carries with it an implicit denial that there is a local *situs* in another state for the purpose of transferring the same thing there. The contrary conclusion as to intangible property has led to nothing but confusion and injustice by bringing about the anomalous and grossly unfair result that one kind of personal property cannot, for the purpose of imposing a transfer tax, be within the jurisdiction of more than one state at the same time, while another kind, quite as much within the protecting reach of the Fourteenth Amendment, may be, at the same moment, within the taxable jurisdiction of as many as four states, and by each subjected to a tax upon its transfer by death, an event which takes place, and in the nature of things can take place, in one of the states only.

"A transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits, of a particular state; and it is unreasonable, and incompatible with a sound construction of the due process of law clause of the Fourteenth Amendment, to hold that jurisdiction to tax that event may be distributed among a number of states." (Italics ours.)

Later on, the Court lays down as the test of actual situs the place where the property is *"kept and used"* (p. 329):

"This ancient maxim *(mobilia sequuntur personam)* had its origin when personal property consisted, in the main, of articles appertaining to the person of the owner, such as gold, silver, jewels and apparel, and, less immediately, animals and products of the farm and shop. Such property was usually under the direct supervision of the owner and was often carried about by him on his

journeys. Under these circumstances, the maxim furnished the natural and reasonable rule. In modern times, due to the vast increase in the extent and variety of tangible personal property not immediately connected with the person of the owner, the rule has gradually yielded *to the law of the place where the property is kept and used.*" (Italics ours.)

And in the next paragraph the Court links up the right to tax to a *"real taxable relationship"* to the power of the state to control the privilege of succession (p. 329):

> "And since death duties rest upon the power of the state imposing them to control the privilege of succession, the reasons which sanction the selection of the domiciliary state in the various cases first named, sanction the same selection in the case last named. In each case, there is wanting, on the part of a state other than that of the domicile, *any real taxable relationship to the event which is the subject of the tax.*" (Italics ours.)

In the Court below, defendant relied on *Blodgett* v. *Silberman*, *277 U. S. 1*, where this Court held that $287.48 of coin and bank notes, kept by a Connecticut decedent in a safe deposit box in New York City (where the decedent was active in business as a partner in a brokerage firm), might not be subjected to inheritance tax by Connecticut. It did not there appear that the coin and bank notes had ever been in Connecticut or that they were ever to be taken or kept or used by the decedent there. From the fact that they were kept in the safe deposit box in New York, it would appear that they were for use in connection with the decedent's New York affairs. This Court considered that this cash had been "so definitely fixed and separated in its actual situs from the person of the owner" that it belonged permanently in New York, as did the paintings and furniture in the Frick case.

The above case is obviously no authority for the position that pictures, originally located permanently in New York, lost their New York domicile and acquired a taxable situs in Pennsylvania merely by reason of a temporary sojourn in Pennsylvania at the request of the people of Pennsylvania, for mere temporary display and not part of the permanent exhibition.

In determining whether or not situs in Pennsylvania was temporary or permanent, reference may be had to some of the older decisions dealing with property taxation.

In *Hays* v. *The Pacific Mail Steamship Co., 58 U. S. 596,* the taxpayer, a New York corporation, engaged in the shipping business, complained of the assessment and collection of property taxes in California upon its ships that put into California ports. This Court upheld the taxpayer, saying (p. 599):

> "She is within the jurisdiction * * * *temporarily,* and for a purpose wholly excluding the idea of *permanently* abiding in the State, or changing her home port."
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> * * * * * * * *
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> "We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the State; they were there but *temporarily,* engaged in lawful trade and commerce, with their *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid." (Italics ours.)

In *Union Refrig. Transit Company* v. *Kentucky, 199 U. S. 194,* this Court held that a Kentucky corporation could not be subjected to property taxation in Kentucky with reference to refrigerator cars permanently employed without the State. In the course of the opinion the Court uses the word "permanently" ten different times, laying emphasis upon the permanence of the location of said property outside of Kentucky and, distinguishing the case of *Commonwealth* v. *American Dredging Co., 122 Pa. 386,* which it apparently approved, upon this basis (p. 208):

> "In *Commonwealth* v. *American Dredging Company,* 122 Penna. St. 386, it was held that a Pennsylvania corporation was taxable in respect to certain dredges and other similar vessels which were built, but not permanently retained outside of the State. It was said that the non-taxability of tangible personal property located permanently outside of

the State was not 'because of the technical principle that the *situs* of personal property is where the domicil of the owner is found. This rule is doubtless true as to intangible property such as bonds, mortgages and other evidences of debt. But the better opinion seems to be that it does not hold in the case of visible tangible personal property *permanently* located in another State. In such cases it is taxable within the jurisdiction where found and is exempt at the domicil of the owner.' *The property in that case, however, was held not to be permanently outside of the State, and therefore not exempt from taxation.*" (Italics ours.)

In *Delaware, etc. R. R. Co.* v. *Pa., 198 U. S. 341,* the Court was considering the capital stock tax upon a Pennsylvania corporation with reference to coal that had been sent out of the state for sale. It was held that the tax was essentially a property tax upon the coal. The Pennsylvania Supreme Court held that the coal was only temporarily located outside the state and, therefore, could be taxed by Pennsylvania. This Court held, however, that the coal had been sent out of Pennsylvania never to return and, therefore, could not be taxed in Pennsylvania. The Court distinguished the American Dredging Company case on this ground, saying (p. 356):

"The asserted transitory nature of this property does not seem to us to be material. At the time of the appraisement it had been transported beyond the jurisdiction of the State, *never to return in kind,* but was intended to be sold in the foreign State. Such property is entirely unlike the property involved in *Commonwealth* v. *American Dredging Co., 122 Pa. St. 386.* That property consisted of vessels, or scows, or tugs, only *temporarily* out of the State of Pennsylvania, for the purpose of engaging in business, and liable to return to the State at any time, and was without any *actual situs* beyond the jurisdiction of the State itself. However temporary the stay of the coal might be in the particular foreign States where it was resting at the time of the appraisement, it was *definitely* and *forever* beyond the jurisdiction of Pennsylvania."

* * * * * * * *

> "* * * the coal had lost *its situs* in Pennsylvania by being transported from that State to foreign States for the purpose of sale, *with no intention* that it should ever return to its State of origin." (P. 360.) (Italics ours.)

While in that case the Court referred to the fact that the coal had been shipped out of Pennsylvania for sale, the importance of this was merely to support the fundamental conclusion that the coal had permanently left Pennsylvania, *"never to return."* In the case at bar, it is not contended that the Clarke pictures were sent out of New York for the purpose of selling them—the idea of a sale did not occur either to the testator or to Mr. Kimball until the spring of 1929, a year after the original loan. While, at Mr. Kimball's request, Mr. Clarke then expressed his willingness to sell the collection, this came to nothing, since Mr. Kimball was unable to find a donor able and willing to undertake the proposed gift.

The essential point in this coal case was that the coal had been sent out of Pennsylvania *never to be returned* and, therefore, Pennsylvania had lost its right to impose a property tax thereon. In the case at bar Thomas B. Clarke sent the pictures to Pennsylvania for purpose of a temporary loan and clearly intended that they should be returned to him in New York City.

It should also be remembered that these pictures were collected by Mr. Clarke at his residence in New York City over a period of thirty years and that the duration of the loan in Pennsylvania, compared to the duration of their location in New York City, was comparatively short. Until the death of Mr. Clarke the pictures of necessity had an actual situs in the State of New York for purposes of taxation and defendants must establish the point that the brief original loan, with its several renewals, to the Pennsylvania Art Museum not only created a new "actual situs" in Pennsylvania but deprived the pictures of their original "actual situs" in New York State. The presumption should be against such a change in situs, on the analogy of those cases which hold that an original domicile is not lost until a new legal residence is clearly acquired.

This reasoning was voiced by this Court in *New York Central Railroad* v. *Miller, 202 U. S. 584.* In that case the State of

New York was attempting to impose a franchise tax—admitted to be a direct property tax—upon cars belonging to a New York corporation which were at times temporarily absent from the State. The railroad contended that a considerable proportion of its cars were constantly out of the State and that such a proportion should be deducted from the taxable value of its capital stock. This Court rejected this argument and said (p. 596):

> "Suppose, then, that the State of New York had taxed the property directly, there was nothing to hinder its taxing the whole of it. It is true that it has been decided that property, even of a domestic corporation, cannot be taxed if it is permanently out of the State. *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 201, 211; *Delaware, Lackawanna & Western R. R.* v. *Pennsylvania*, 198 U. S. 341; *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 385. But it has not been decided, and it could not be decided, that a State may not tax its own corporations for all their property within the State during the tax year, even if every item of that property should be taken successively into another State for a day, a week, or six months, and then brought back. Using the language of domicil, which now so frequently is applied to inanimate things, the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts. *Ayer & Lord Tie. Co.* v. *Kentucky*, May 21, 1906, *ante*, p. 409. See also *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 208, 209"

If, as suggested by this Court in the above case, we follow the analogy of loss and acquisition of domicile, treating the pictures as original residents of New York who, it is contended, acquired a new domicile in Pennsylvania, the solution is simple.

> *Sun Printing & Publishing Assn.* v. *Edwards*, 194 U. S. 377, 383.
>
> "* * * it is elementary that, to effect a change of one's legal domicil, two things are indispensable: First, residence in a new domicil; and, second, the intention to

remain there. The change cannot be made, except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. *Mitchell* v. *United States*, 21 Wall. 350."

Suppose that, instead of lending Dr. Kimball 79 paintings, Mr. Clarke had lent 79 New York workmen to help build the new Museum. Suppose further that this loan had been originally for six months and had been renewed from time to time at Kimball's request, but without any thought on the part of Clarke or of the workmen that they would not all go back to New York when their job was done, or sooner if Mr. Clarke needed their services at home. Could it be said that the mere fact that they lived for two years and ten months in the workmen's camp at the site of the building, all still on Clarke's payroll, would have lost them their New York citizenship or have given Pennsylvania the right to impose an inheritance tax on the estates of any who died before Mr. Clarke actually summoned them home?

In the case at bar there was no intimation of any purpose on Mr. Clarke's part to have the pictures remain permanently in Pennsylvania. They were merely loaned to Pennsylvania from week to week. Their domicile was New York and remained New York at the time of Mr. Clarke's death.

CONCLUSION.

It is respectfully submitted that the judgment of the Court below should be reversed with directions to award the injunction as prayed.

Respectfully submitted,

LESLIE M. SWOPE,
HENRY S. DRINKER, JR.,
H. GORDON McCOUCH,
Counsel for Appellant.